THE RECORDER

The State Bar's Discipline System Is Broken

MORAL COMPASS

Richard Zitrin, The Recorder

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Once again, calls to "de-unify" the bar have grown louder, including voices in the legislature, which determines the bar's budget. To most, de-unification means taking discipline away from the State Bar.

The idea makes some sense. After all, today's discipline system faces most of the same problems and challenges that have existed for decades. And the lack of continuity—acting chief trial counsel Gregory Dresser, who began on May 9, is the fifth head prosecutor in the last seven years—doesn't help.

Jayne Kim, who became chief trial counsel in late 2011, resigned effective May 6. She'd been battered and bruised by a lawsuit by former executive director Joe Dunn, who blamed his firing on her, accusations from high-profile lawyer Tom Girardi that he has been targeted by the bar

because he represents Dunn's former executive assistant, also fired; and a recent vote of no-confidence from her own trial attorneys.

The Dunn and Girardi claims seem like little more than tabloid fodder. As to the vote of no confidence, in her conversations with me, Kim was neither defensive nor repentant. She saw her job priority as "quality control"—a phrase she used often in our talks—that is, improving the work product of her staff.

One of the biggest complaints I heard from her staff was that Kim had taken away much of each individual lawyer's discretion, but Kim argued that significant oversight is warranted in any prosecutorial office, like in the U.S. attorney's office where she also served. "I feel for staff attorneys, but there needs to be a cultural shift," Kim told me.

I also had two conversations with Dresser, who was forthcoming, though more guarded than Kim and a bit defensive. But he's a newbie, only a year removed from private practice at Morrison & Foerster, with no previous prosecutorial experience.

Dresser too emphasized "quality," and that the right staffing was also his "No. 1 priority." But Dresser claimed that "trial counsel have a wide range of discretion in charging, handling, trying, and resolving" cases—something that few others agree with, including Kim.

All this leaves us at a crossroads with no signposts and little sense of direction. And the serious disciplinary issues remain unresolved.

The Backlog

The biggest of these issues is the oft-discussed "backlog." Bar executive director Elizabeth Parker and both Kim and Dresser all referenced "reducing the backlog" as the most important goal, citing a legislative mandate and a recent independent audit.

What exactly is the "backlog"? Business & Professions Code § 6086.15 requires the bar to provide an annual discipline report that includes "[t]he existing backlog of cases within the discipline system, including the number of complaints as of December 31 of the preceding year that were pending beyond six months after receipt without dismissal, admonition, or the filing of a notice of disciplinary charges."

But the statute mandates a report, not that all cases must be acted on within six months. The legislature clearly wants to hold the State Bar's feet to the fire, but making the backlog the bar's highest priority is letting the tail wag the dog, even if that reaction is understandable. The audit's highest priority was clear: "public protection."

When Jim Towery began his all-too-brief term as chief of discipline in 2010, he made it clear that public protection was his No. 1 priority. To do that, he wanted, rightly, to focus on prosecuting those malfeasants who were doing the most harm to the public. But when Dunn preemptively forced Towery to resign in 2011, Towery's "failure" to reduce the "backlog" was the excuse Dunn used to force him out.

Since then, the backlog has taken center stage.

Thus, the 2015 Attorney Discipline Report, released at the end of April, spends 26 of its 44 pages on the backlog and the speed with which complaints are handled, replete with statistics and tables. But the report says nothing about how the bar is treating the most serious cases—those lawyers who form the greatest risks to the public.

"Quality control" is important, and more competent and better-trained trial counsel vital. But "quality" is a staffing issue, not the same as prioritizing those who pose the largest public risk. Kim, to her credit, acknowledged this, saying that going after the worst offenders is "always a priority. Or, it should be the priority." But the shadow of the backlog is long.

I don't think it would be difficult to simply make these cases the priority, and then do a better job of explaining things to the legislature. But the bar does little publicly to emphasize this priority. Even though trial counsel's office characterizes its cases on intake as category 1, 2, or 3, with "1" being the most serious, no mention of these categories was made anywhere in the new report.

It's Not Just Backlog

Several staff attorneys I talked with who voted no-confidence pointed to some deputy trial counsel who spend most of their time prosecuting minimum continuing legal education (MCLE) compliance violators, which they consider relatively trivial busywork. Both Kim and Dresser acknowledge that this happens to a degree. Disgruntled staff attorneys also complain that, although sentencing guidelines don't call for suspension in MCLE cases, they have been instructed to file MCLE violations as "moral turpitude" complaints, which involve actual suspension.

Both Kim and Dresser counter with a distinction between mere MCLE non-compliance and lawyers who knowingly perjure themselves in compliance declarations. Perhaps a valid distinction, but it seems that today's MCLE prosecutions are low-hanging fruit similar to the hypertechnical trust-fund violations that have long been an Office of Chief Trial Counsel specialty. I question whether either of these really do direct, significant harm to the public.

Treatment of Complainants and Transparency

A final problem has been somewhat less scrutinized, but is no less serious. Those who complain about the actions of lawyers and other witnesses to unethical conduct seem to be afforded far fewer courtesies—and far less information—than the lawyers themselves.

Current State Bar rules require that investigations of lawyers are secret until a notice of disciplinary charges is brought. But this leaves members of the public in the dark. Complainants and key witnesses are often contacted by the Office of Chief Trial Counsel investigator assigned the case and formally interviewed. In serious or complex cases, they may be contacted and asked repeatedly to provide extensive documentation. Yet, unlike most local prosecutors, neither these investigators nor their supervising lawyers keep people in the loop about the progress of the

investigation. After an investigation is initiated, an investigator and prospective "respondent" lawyer go back and forth to discuss the charges, but the complainant is left completely in the dark.

Even if the bar concludes that disciplinary charges should be brought, the accused lawyer is offered a chance to "plead out," which could result in a warning or "private reproval" that complainants and witnesses are never told about. And when a complaint is closed without charges filed, complainants are given no reasons, and "witnesses," sometimes lawyers for complainants who provide the extensive documentation, are not told at all.

These "investigations" are usually far different from those conducted by police departments or even in-house DA investigators. My perception is that investigators expect their complainants and witnesses to do the bulk of the legwork rather than affirmatively getting out "on the street" and doing it themselves.

Jayne Kim acknowledged that this was a problem, and said she'd instituted trainings that encouraged investigators to act less "passively" when "there's credible information." So far, that's all too rare.

Where Does Discipline Go From Here?

On balance, the repeated failures of the discipline system over time, and the seeming inability of the discipline system to make prosecuting the worst offenders the No. 1 priority, means it probably is time to remove the discipline system from the State Bar. Besides, the "soft wall" between administrative and disciplinary segments of the bar can undermine the efforts of prosecutors to maintain professional independence. Dunn interfered with both Towery and Kim, and two former chief disciplinary counsel, Judy Johnson and Herb Rosenthal, were "promoted" to executive director.

The biggest problem with removing discipline from the State Bar is where this function should be placed. The courts are unlikely to leap at the opportunity, and while the state attorney general, which disciplines physicians, is a possibility, lawyers are directly governed by the Supreme Court.

Given that, I'm willing to give things another year under yet another chief disciplinarian. But legislators and others—and the State Bar itself—ought to use this time to start looking at the best way to outsource lawyer discipline.

Richard Zitrin is a professor at UC Hastings and principal of San Francisco's Zitrin Law Office. He is the lead author of three books on legal ethics, including The Moral Compass of the American Lawyer, and the 4th edition of Legal Ethics in the Practice of Law.